

NO.: NNH-CV-14-6050848-S

ZHAOYIN WANG,	:	SUPERIOR COURT
Plaintiff,	:	
	:	
v.	:	J.D. OF NEW HAVEN
	:	DOCKET
BETA PHARMA, INC., DON ZHANG AND	:	
ZHEJIANG BETA PHARMA CO., LTD.,	:	
Defendants.	:	NOVEMBER 5, 2015

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE

Pursuant to Practice Book § 10-39(c), defendants Beta Pharma, Inc. (“Beta Pharma”) and Don Zhang (“Zhang”) (collectively “Defendants”) file this Memorandum of Law in support of their Motion to Strike, which is directed to the Third through Eighth Counts of plaintiff Zhaoyin Wang’s Complaint. These Counts must be dismissed because they are barred by the economic loss doctrine, and because Plaintiff has failed to state legally cognizable causes of action for breach of fiduciary duty.

I. ALLEGED FACTS¹

A. Background on the Parties

Beta Pharma is a pharmaceutical company. Complaint, First Count, ¶ 1. Zhang is its president. *Id.*, ¶ 3. Beta Pharma owns stock in a Chinese company, Zhejiang Beta Pharma Co., Ltd. (“ZJBP”). *Id.*, ¶¶ 5-6.

Plaintiff alleges that, on March 26, 2010, Beta Pharma entered into a written partnership agreement with him (the “Agreement”), pursuant to which he was to perform professional services for Beta Pharma, and in exchange he was to receive a salary and

¹ Because this is a motion to strike, the facts (but not legal conclusions) alleged in Plaintiff’s Complaint must be taken as true. Nothing in this motion is intended as, or should be taken as, an admission of the truth of any facts alleged.

certain shares in Beta Pharma and ZJBP. Id., ¶ 10.² He further alleges that, in reliance on the Agreement, he formed a Canadian corporation called Beta Pharma Canada (“BPC”), invested certain funds of his own in setting up and operating the BPC laboratory, worked for BPC full time for approximately three years, applied for certain patents, worked to develop the molecule Icotinib and reinforce the Icotinib patent, and performed other work for Beta Pharma, BPC and Zhang. Id., ¶ 11.

B. Plaintiff's Claims

In his First Count, Plaintiff brings a claim for breach of contract against Beta Pharma, alleging that it failed to carry out obligations under the Agreement. Id., ¶ 12. In the Second Count, Plaintiff brings a claim for breach of contract against Zhang, alleging the same breaches. Id., Second Count, ¶ 15. Specifically, Plaintiff alleges that Beta Pharma and Zhang breached the Agreement by (1) failing to pay him his salary, (2) discontinuing funding for BPC, (3) failing to deliver shares in Beta Pharma to him, (4) failing to register shares in ZJBP in his name on the records of ZJBP in China so he could participate in a planned initial public offering of ZJBP shares in China, and (5) failing to cause him to participate in the ZJPB public offering. Id., First Count, ¶ 12; Second Count, ¶ 15.

In the Third Count, Plaintiff purports to bring a claim for negligent misrepresentation against Beta Pharma, alleging that Beta Pharma, acting through Zhang, represented:

- a. that it would pay Plaintiff a salary of 850,000 RMB;
- b. that Plaintiff would receive about 2% of Beta Pharma's stock;

² Plaintiff attached a copy of the Agreement to the Complaint as Exhibit A.

- c. that Plaintiff owned 1% of the stock in ZJBP;
- d. that Plaintiff's stock ownership in Beta Pharma could increase annually;
- e. that Plaintiff's shares in ZJBP were worth \$4 million in about 2011;
- f. that Plaintiff's shares in ZJBP were worth about \$6 million in 2013; and
- g. that Plaintiff would participate in the ZJBP public offering in China.

Id., Third Count, ¶ 11. Plaintiff alleges that these representations were negligently false and misleading. As noted below, his allegations about the falsity of these representations amount to contentions that Beta Pharma made promises that it breached and knew that it would breach, and these alleged promises closely track the provision of the Agreement that Plaintiff alleges Beta Pharma and Zhang breached.

Specifically, Plaintiff alleges that Beta Pharma knew or should have known that it did not, would not, and could not register his share ownership on the official records of ZJBP, that it did not and would not pay him the salary, that it did not and would not deliver him promised shares in Beta Pharma, that it did not and would not cause him to participate in the ZJBP public offering, that his shares in ZJBP were not transferrable and saleable to others, and that unless Beta Pharma repurchased his shares, he could not realize the cash value of his stockholding in ZJBP. Id., ¶ 12. Plaintiff alleges that he relied on Beta Pharma's representations and suffered certain economic losses from its negligence. Id., ¶¶ 14-15. In the Sixth Count, Plaintiff makes exactly the same allegations of negligent misrepresentation, and seeks exactly the same relief, except that the Sixth Count is brought against Zhang personally instead of against Beta Pharma. Id., Sixth Count, ¶¶ 12-17.

Plaintiff's Fourth and Seventh Counts are based on exactly the same representations as the Third and Sixth Counts, but sound in fraudulent

misrepresentation instead of negligent misrepresentation. Id., Fourth Count, ¶¶ 11-15; Seventh Count, ¶¶ 13-17. The Fourth and Seventh Counts allege the same conduct and damages as the Third and Sixth Counts. Id. The Fourth Count is brought against Beta Pharma, while the Seventh Count is brought against Zhang. Id.

Plaintiff's Fifth and Eighth Counts allege breach of fiduciary duty against Beta Pharma and Zhang, respectively. Plaintiff alleges that both Beta Pharma and Zhang were his partners and fiduciaries. Id., Fifth Count, ¶ 11; Eighth Count, ¶ 13. He alleges that Beta Pharma and Zhang breached their fiduciary duties by:

- a. failing to pay Plaintiff's salary;
- b. failing to issue Beta Pharma stock to Plaintiff;
- c. failing to register Plaintiff's ZJBP shares on the official shareholder list of ZBP;
- d. failing to cause Plaintiff to participate in the anticipated ZJBP public offering;
- e. misrepresenting to Plaintiff that they would finance Plaintiff's work and investment in BPC, but failing to do so;
- f. promising Plaintiff that his salary arrearage would be paid from the proceeds of Beta Pharma's venture capital fundraising activities, but failing to pay him;
- g. failing to disclose to Plaintiff that the ZJBP board of directors would not permit Beta Pharma to transfer shares to him, and would not recognize Beta Pharma's transfer of shares, and that it had ordered Beta Pharma to cancel or unwind the transaction by paying Plaintiff the fair market value of his interest in ZJBP;
- h. representing to him that he would receive the promised salary and participation in the ZJBP public offering for the purpose of causing him to delay enforcement of his rights, but failing to perform on those promises;
- i. failing to provide Plaintiff with material financial information so that he could determine whether or not to acquire shares of Beta Pharma and ZJBP, including prospectuses, balance sheets, income statements,

statements of profit and loss, accountant's compilations, tax returns, disclosures of material items which did or could affect the financial condition of Beta Pharma or ZJBP, and other documentation from which Plaintiff could assess the true condition and potential of Beta Pharma and ZJBP;

- j. misrepresenting to Plaintiff the value and marketability of his ZJBP shares;
- k. failing to provide a market for Plaintiff's ZJBP shares such that he could exchange or sell them for cash equivalents to their fair market value; and
- l. failing to provide Plaintiff with a full disclosure of all material information to which he was entitled under Connecticut law.

See Complaint, Fifth Count ¶ 13; Eighth Count ¶ 14.³ Again, these allegations closely track Plaintiff's allegations about the provisions of the Agreement that Beta Pharma and Zhang allegedly breached.

Plaintiff's Ninth Count seeks a declaratory judgment against ZJBP, which has not appeared as a defendant in this action. The declaration sought would establish Plaintiff's ownership of certain shares in ZJBP, cause ZJBP to list his shares and ownership on the official record of shareholders in the People's Republic of China, and require that ZJBP grant him all other rights appurtenant to status as a ZJBP shareholder under the laws of China. Id., Ninth Count, ¶ 5.

C. Procedural History

On November 10, 2014, Plaintiff filed this action in this Court. ZJBP never filed an appearance. On December 1, 2014, Defendants removed the action to the United States District Court for the District of Connecticut. On August 24, 2015, the District Court remanded the action to this Court.

³ Three paragraphs in the Eighth Count are numbered "14," so this Memorandum will refer to them collectively as "Eighth Count ¶ 14."

Defendants now submit this Motion to Strike and request that the Court strike the Third through Eighth Counts, which are all barred by the economic loss doctrine. Furthermore, the Court should strike Plaintiff's claims for breach of fiduciary duty (Fifth and Eighth Counts) for failure to state legally cognizable causes of action.

II. LEGAL ARGUMENT

A. Plaintiff's Third through Eighth Counts are Legally Insufficient and Must Be Stricken

Plaintiff's Third through Eighth Counts must be stricken as insufficient as a matter of law.

A party may contest "the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief may be granted" by "filing a motion to strike the contested pleading or part thereof." Practice Book § 10-39(a).

In ruling on a motion to strike, the Court is limited to consideration of the facts alleged in the complaint. Faulkner v. United Techs. Corp., 240 Conn. 576, 580 (1997). While a motion to strike admits all facts well pleaded, "it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." Doe v. Yale Univ., 252 Conn. 641, 694 (2000) (internal quotation marks omitted). A court should grant a motion to strike "if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498 (2003) (internal quotation marks omitted).

Admitting all facts in the Complaint, the Third-Eighth Counts must be dismissed because the economic loss doctrine bars those claims. Also, Plaintiff has failed to plead breaches of fiduciary duty, again, requiring dismissal of the Fifth and Eighth Counts.

B. The Economic Loss Doctrine Bars the Third through Eighth Counts

1. Plaintiff May Not Premise Tort Claims on Alleged Breaches of Contract

The economic loss doctrine bars Plaintiff's attempt at bringing tort claims based on alleged breaches of contract.

Plaintiff's claims arise primarily from purported breaches of the Agreement.⁴ In addition to bringing breach of contract claims, however, Plaintiff also seeks to assert tort claims based on the same conduct. The use of tort theories to obtain damages based on alleged contractual violations is barred by the economic loss doctrine.

That doctrine "is a common-law rule limiting a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property." State v. Lombardo Bros. Mason Contractors, Inc., 307 Conn. 412, 469 n. 41 (2012) (internal citation omitted). It "bars recovery in tort where the relationship between the parties is contractual in nature and the only losses alleged are purely economic." Doherty, Beals & Banks, P.C. v. Sound Community Serv., Inc., 2011 WL 2177257, *5 (Conn. Super. Ct. May 19, 2011); Aliko Foods, LLC v. Otter Valley Foods, Inc., 726 F.Supp.2d 159, 164 (D.Conn. 2010) (same) (citations and quotation omitted). Simply stated, the economic loss doctrine bars recovery in tort for contract-based damages.

The Connecticut Supreme Court recently confirmed the applicability of the economic loss doctrine in Connecticut, clarifying that it is not limited to sales of goods

⁴ A plaintiff may attach a copy of a document as an exhibit to the complaint, making it part of the complaint. Practice Book § 10-29(a). "A complaint includes all exhibits attached thereto." Tracy v. New Milford Pub. Schs., 101 Conn. App. 560, 566 (2007), quoting Dlugokiecki v. Vieira, 98 Conn. App. 252, 258 n. 3 (2006). Thus, the Court may consider the Agreement in deciding this Motion to Strike.

under Article 2 of the Uniform Commercial Code. Ulbrich v. Groth, 310 Conn. 375, 403-04 (2013). As the Court explained, under the economic loss doctrine, a tort claim is barred if it arises from, and is dependent on, a contractual relationship between the parties. Ulbrich at 403-04. Put differently, the economic loss doctrine applies where the tort and contract claims are based on the same alleged conduct. Id. at 405. See also ODP, LLC v. Shelterlogic, LLC, 2007 WL 4801436, *2 (Conn. Super. Ct. Dec. 21, 2007) (tort claims barred where conduct giving rise to tort claims is the same as conduct giving rise to contract claims).

Here, the economic loss doctrine bars the following tort claims: Third and Sixth Counts, Negligent Misrepresentation; Fourth and Seventh Counts, Fraudulent Misrepresentation; Fifth and Eighth Counts, Breach of Fiduciary Duty.⁵ As in Ulbrich, Plaintiff's tort claims are not independent of his contractual claims, but arise from them. Plaintiff's tort claims are all based on the relationship with Beta Pharma and Zhang that he alleges is governed by the Agreement. All of his allegations in Counts Three through Eight concern the salary that Plaintiff allegedly was to receive under the Agreement, the Beta Pharma and ZJBP stock that Plaintiff allegedly was to receive under that Agreement, and the ZJBP public offering that Plaintiff allegedly was to participate in under that Agreement. Complaint, Third Count, ¶¶ 11-15; Fourth Count, ¶¶ 11-15; Fifth Count, ¶¶ 11-14; Sixth Count, ¶¶ 11-15; Seventh Count, ¶¶ 13-17; Eighth Count, ¶ 14. Further, all the work that Plaintiff alleges he performed in the tort counts is exactly the work he alleges he performed under the Agreement: forming BPC, working for BPC

⁵ Ahern v. Kappalumakkel, 97 Conn.App. 189, 192 n. 3 (2006) ("Breach of fiduciary duty is a tort action"); Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 575 (1995) (tort of negligent misrepresentation); Kramer v. Petisi, 285 Conn. 674, 683-84 (2008) (tort of fraudulent misrepresentation).

for three years, working with Beta Pharma to develop Icotinib, and other work to advance Beta Pharma, ZJBP and BPC. Id., Third Count, ¶ 14; Fourth Count, ¶ 14; Sixth Count, ¶ 14; Seventh Count, ¶ 15. In the tort counts, Plaintiff only makes allegations about events that were part of the contractual relationship that he also alleges in the First and Second Counts – that is, in the breach of contract claims.

Additionally, each of the tort claims alleges purely economic losses. The economic loss doctrine limits a contracting party to contractual remedies for economic losses that are “unaccompanied by physical injury to persons or other property.” State v. Lombardo Bros. Mason Contractors, Inc., 307 Conn. 412, 469 n. 41 (2012). In each of these counts, Plaintiff alleges that he suffered loss of a promised salary, loss of an ownership interest in Beta Pharma, financial losses related to ZJBP shares and the ZJBP public offering, loss of money that he allegedly could have earned elsewhere had he not been working with Beta Pharma and Zhang, loss of the money he allegedly invested in BPC, and loss of profits from BPC. Id., Third Count, ¶ 15; Fourth Count, ¶ 15; Fifth Count, ¶ 14; Sixth Count, ¶ 15; Seventh Count, ¶ 15; Eighth Count, ¶ 14. The only other loss he alleges in any of his tort counts is the claim that he was delayed in the enforcement of his rights – that is, rights to salary and other economic benefits. Plaintiff again alleges only an economic loss. At no point in the Complaint does Plaintiff allege a physical injury to persons or property or any other non-economic loss. Likewise, in the Claim for Relief, Plaintiff seeks only economic relief against Beta Pharma and Zhang.

In sum, the alleged conduct by Defendants that underlies each of the tort claims is the same conduct that he alleges constituted breaches of the Agreement. Ulbrich,

310 Conn. at 405; ODP, 2007 WL 4801436 at *2. Likewise, the harms alleged in each tort count are the same harms that Plaintiff allegedly suffered from the alleged contractual breaches. Accordingly, the economic loss doctrine requires dismissal of Plaintiff's tort claims.

2. Plaintiff's "Misrepresentation" Claims Must Be Dismissed Under the Economic Loss Doctrine

Plaintiff's claims for negligent and fraudulent misrepresentation are based on alleged "representations" that were in fact the same promises that underlie the breach of contract claims. The first three alleged representations at issue in all four misrepresentation counts are promises that Beta Pharma and Zhang would pay Plaintiff a certain salary, that Plaintiff would receive certain Beta Pharma and ZJBP stock, and that Plaintiff would participate in the ZJBP public offering in China, along with related promises. Id., Third and Fourth Counts, ¶ 11(a)-(c), Sixth and Seventh Counts, ¶ 12(a)-(c). These are all among the promises that are the basis for the breach of contract counts. Id., First Count, ¶¶ 10, 12; Second Count, ¶¶ 11, 15. Another alleged promise is "that plaintiff's stock ownership in BP would increase annually." Id. Third and Fourth Counts, ¶ 11(d), Sixth and Seventh Counts, ¶ 12(d). Again, this promise is linked to the alleged promises in the breach of contract claims.

Another alleged promise, found only in the counts against Zhang, is that Plaintiff would be able to convert his 1% interest in ZJBP into 1% of the shares of the initial public offering. Id., Sixth and Seventh Counts, ¶ 12(i). This is merely an expansion of the allegation that Defendants breached the Agreement by failing to cause Plaintiff to participate in the ZJBP public offering, an allegation in the breach of contract Counts Id., First Count ¶ 12, Second Count ¶ 15.

Plaintiff also alleges Zhang promised that he would perform his and Beta Pharma's obligations to Plaintiff. Id., Sixth and Seventh Counts, ¶ 12(h). Since a party to a contract always promises performance, this adds nothing to the breach of contract allegations. Furthermore, all of Zhang's purported obligations to Plaintiff were based on the Agreement and therefore were contractual.

The two remaining representations, "that plaintiff's shares in ZBP were worth \$4 million in about 2011" and "that plaintiff's shares in ZBP were worth about \$6 million in 2013," concern the shares to which Plaintiff allegedly is entitled under the Agreement. Id., Third Count ¶ 11(e)-(f), Fourth Count ¶ 11(e)-(f). The allegations therefore stem directly from the contract. Indeed, these representations could only have been made well after the Agreement was signed in 2010, after Plaintiff allegedly relied on Defendants' representations in connection with the Agreement. Again, they derive from the breach of contract allegation that Defendants promised Plaintiff shares in ZJBP. Id., First Count ¶ 10, Second Count ¶ 11.

Plaintiff's allegations that these "representations" were negligently or fraudulently false and misleading consist of assertions that Beta Pharma and Zhang knew or should have known that they would not keep the promises. Id., Third and Fourth Counts, ¶ 12; Sixth and Seventh Counts, ¶ 13. However, failure to keep these promises also constitutes the basis for the breach of contract counts. Id., First Count, ¶ 12, Second Count, ¶ 15. If a plaintiff were permitted to re-plead his breach of contract allegations as misrepresentations merely by adding conclusory, unprovable assertions about the defendant's intent not to keep a promise, the economic loss doctrine would be eviscerated. Every time a party made a contractual promise that it failed to keep, it

could be held liable for torts as well as breach of contract. This would violate the rule that tort claims must be independent of contract claims. Ulbrich v. Groth, 310 Conn. 375, 404-05 (2013).

Plaintiff makes various “nondisclosure” claims in support of the negligent and fraudulent misrepresentation Counts. As discussed below in section C, Plaintiff has not properly pled nondisclosure claims, so these allegations must be disregarded. In addition, the nondisclosures allegedly supported the breaches of contract.

Likewise, the damages that Plaintiff allegedly suffered from the misrepresentations mirror the damages that he alleges in the breach of contract claims. These consist of loss of salary, loss of ownership interests in Beta Pharma, loss of proceeds from the ZJBP public offering, and related losses. Id., Third and Fourth Counts, ¶ 15; Sixth and Seventh Counts, ¶ 17. In the breach of contract counts, Plaintiff seeks specific performance that would pay him the salary, give him ownership interests in Beta Pharma, and give him shares in ZJBP. Id., First Count, ¶ 14, Second Count, ¶ 17.

Simply stated, the alleged misrepresentations are a rewording of the alleged breaches of contract. There is no theory under which Plaintiff could prevail on his claims for negligent and fraudulent misrepresentation even if his breach of contract claims failed.⁶ Accordingly, the misrepresentation claims are barred. See Ulbrich, 310 Conn. at 405 (negligent misrepresentation claims barred where based on same conduct and evidence as contract claims); ODP, 2007 WL 4801436 at *2 (tort claims barred

⁶ For example, if Defendants establish that the Agreement is devoid of elements necessary to form a legally binding contract, the contract-based claims and the tort claims would all fail.

where conduct giving rise to tort claims is the same as conduct giving rise to contract claims).

3. The Economic Loss Doctrine Bars Plaintiff's Breach of Fiduciary Duty Claims

Plaintiff's breach of fiduciary duty claims in the Fifth and Eighth Counts fail for the same reason. The alleged conduct giving rise to the breaches of fiduciary duty is the same as the alleged breaches of contract in the First and Second Counts. Plaintiff alleges that Beta Pharma and Zhang breached their fiduciary duties by failing to pay his salary, failing to issue him Beta Pharma stock, failing to register his ZJBP shares, failing to cause him to participate in the ZJBP public offering, failing to finance BPC, failing to provide a market for his ZJBP shares, and closely related actions. Complaint, Fifth Count, ¶ 13; Eighth Count, ¶ 14. The damages Plaintiff alleges he suffered from the breaches of fiduciary duty are those he alleges he suffered from the breaches of contract: loss of salary, loss of ownership interests in Beta Pharma, loss of proceeds from the ZJBP public offering, and related losses. *Id.*, Fifth Count ¶ 14; Eighth Count, ¶ 14. Because the alleged conduct and harms are the same, the breach of fiduciary duty claims cannot succeed if the breach of contract claims fail, and thus the economic loss rule bars the breach of fiduciary duty claims.

For these reasons, the economic loss doctrine bars all of Plaintiff's tort claims.

C. Plaintiff Fails to Plead Misrepresentation Claims Based on "Nondisclosure"

Plaintiff includes alleged nondisclosures among the basis for the negligent and fraudulent misrepresentation counts. *Id.*, Third and Fourth Counts, ¶ 13; Sixth and Seventh Counts, ¶ 14. However, Plaintiff fails to plead facts necessary to support a claim for misrepresentation based on nondisclosure.

As to negligent misrepresentation, the Appellate Court has explained that “[l]iability for negligent misrepresentation may be placed on an individual when there has been ‘a failure to disclose known facts and, in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak.’” Johnnycake Mountain Assocs. v. Ochs, 104 Conn. App. 194, 206 (2007), quoting Duksa v. Middletown, 173 Conn. 124, 127 (1977). “Such a duty is imposed on a party insofar as he voluntarily makes disclosure,” and “[a] party who assumes to speak must make full and fair disclosure as to the matters about which he assumes to speak.” Id.

The standard for alleging fraudulent misrepresentation based on nondisclosure is the same. A fraud claim can only be based on nondisclosure if there was a duty to speak, and such a duty arises when the parties voluntarily make disclosures or have verbal or written communications about subject matters. Duksa, 173 Conn. at 127. “[M]ere nondisclosure . . . does not amount to fraud.” Id., quoting Watertown Savings Bank v. Mattoon, 78 Conn. 388, 393 (1905). As with negligent misrepresentation, “[s]uch a duty is imposed on a party insofar as he voluntarily makes disclosure. A party who assumes to speak ‘must make a full and fair disclosure as to the matters about which he assumes to speak.’” Id., quoting Franchey v. Hannes, 152 Conn. 372, 379 (1965).

Claims based on nondisclosure can only survive this Motion if Plaintiff pled facts creating a duty to disclose the allegedly withheld information. More specifically, Plaintiff must have pled that the parties had verbal or written communications about subject matters covering the allegedly undisclosed facts. Here, Plaintiff failed to plead that Beta Pharma and Zhang had duties of disclosure.

First, Plaintiff alleges that Beta Pharma withheld material information concerning the financial condition of Beta Pharma and ZJBP. Complaint, Third and Fourth Counts, ¶ 13(a)-(b), Sixth and Seventh Counts, ¶ 14(a)-(b). However, Plaintiff has pled no facts indicating that his purported agreement with Beta Pharma concerned Beta Pharma's or ZJBP's financial condition and has not pled that the parties ever had verbal or written communications about Beta Pharma's or ZJBP's financial condition. The Agreement is similarly devoid of any information regarding Beta Pharma's or ZJBP's financial condition. Thus, Plaintiff has not pled that Beta Pharma and Zhang had duties to disclose information on this subject matter.

The same logic applies to other nondisclosure allegations, including allegations that Beta Pharma did not disclose:

- “material information concerning the transactions and relationship between BP and ZBP” (Id., Third and Fourth Counts, ¶ 13(c), Sixth and Seventh Counts, ¶ 14(c));
- “material information concerning transactions in which BP sold or transferred ZBP shares to others for valuable consideration” (Id., Third and Fourth Counts, ¶ 13(d), Sixth and Seventh Counts, ¶ 14(d));
- “BP's knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by BP to be registered in China” (Id., Third and Fourth Counts, ¶ 13(e), Sixth and Seventh Counts, ¶ 14(e));
- “BP's knowledge that the ZBP board had ordered BP to repurchase ZBP shares from investors at their current fair market value” (Id., Third and Fourth Counts, ¶ 13(f), Sixth and Seventh Counts, ¶ 14(f));

- “BP's knowledge of the nature and extent of the market it made or was prepared to make for repurchase of ZBP shares so that investors could realize gain on their investments in ZBP” (Id., Third and Fourth Counts, ¶ 13(g), Sixth and Seventh Counts, ¶ 14(g)); and
- “that BP had failed to provide to plaintiff material documentary information concerning BP and ZBP” (Id., Third and Fourth Counts, ¶ 13(h), Sixth and Seventh Counts, ¶ 14(h)).

While Plaintiff alleges that Defendants failed to honor the Agreement, he does not plead that the parties had verbal or written communications about any such subject matters. For example, Plaintiff fails to plead that the Agreement, or related conversations, in any way concerned whether the “ZBP board had ordered BP to repurchase ZBP shares.” Since Plaintiff pled no facts regarding the parties having verbal or written communications about such subject matters, Plaintiff has not pled that either Beta Pharma or Zhang had a duty to make such disclosures.

Plaintiff also makes a nondisclosure claim based on an alleged failure to inform him that that Defendants “had failed to comply with Federal and Connecticut securities laws regulating their ability to sell unregistered securities in Connecticut, including C.G.S. Sec. 36b-4 and 36b-16.” Id., Third and Fourth Counts, ¶ 13(i), Sixth and Seventh Counts, ¶ 14(i). (The Third Count only refers to Connecticut securities laws.) This claim fails because Plaintiff has not alleged facts to show that Beta Pharma or Zhang were aware of the alleged violations of securities laws. See Johnnycake Mountain Assocs., 104 Conn. App. at 206, quoting Duksa, 173 Conn. at 127 (liability is based on failure to disclose known facts).

Accordingly, Plaintiff's nondisclosure claims fail as a matter of law.

D. Plaintiff Has Failed To State a Cause of Action For Fraud

Even if Plaintiff's claims for fraudulent misrepresentation in the Fourth and Seventh Counts were not barred by the economic loss doctrine (and they are), they fail because Plaintiff has failed to properly state claims for fraud. In order to state a claim of fraud under Connecticut law, a plaintiff must allege: "(1) a false representation was made [by the defendant] as a statement of fact; (2) it was untrue and known to be so [by the defendant]; (3) the statement was made to induce reliance thereon; and (4) the other party did so act upon the statement to his detriment." Nazami v. Patrons Mut. Ins. Co., 280 Conn. 619, 628 (2006), quoting Weinstein v. Weinstein, 275 Conn. 671, 685 (2005).

"When a 'claim for damages is based upon fraud, the mere allegation that a fraud has been committed is insufficient; the specific acts relied on must be set forth in the complaint.'" Id., quoting Maruca v. Phillips, 139 Conn. 79, 81 (1952); see also Chase Manhattan Morg. Corp. v. Machado, 83 Conn. App. 183, 188 (2004) (summary judgment granted against fraud claim because plaintiff did not allege "any specific facts showing that the original mortgagee . . . knowingly participated in any fraud against her.")

Plaintiff does not plead facts to satisfy the second and third elements of fraud. Plaintiff does not even allege that Beta Pharma knew any statements to be untrue. In the Fourth Count, he alleges that Beta Pharma "knew, or should have known" that it would not keep its promises. Complaint, Fourth Count, ¶ 12. An allegation that a defendant "knew, or should have known" a fact is not enough to support a claim for

fraud. Nazami, 280 Conn. at 628; see also Bank of Am., N.A. v. Longo, 2013 WL 6133204, *5 (Conn. Super. Ct. Oct. 13, 2013) (the allegation that the defendant “knew or should have known” fails to state a claim for fraud). The Seventh Count alleges that Zhang “knew” that he would not keep his promises. Complaint, Seventh Count, ¶ 13. Again, that allegation is a mere conclusion, not backed up by specific factual allegations that, if true, would establish that Zhang knew he would not keep his promises.

Plaintiff also alleges that Defendants committed fraud through nondisclosure. Id., Fourth Count ¶ 13, Seventh Count ¶ 14. However, as explained above, Plaintiff does not allege the set of communications necessary to support a claim for fraud through nondisclosure.

In addition, Plaintiff fails to allege that Defendants made the statements in order to induce reliance. Nor does he allege specific facts that, if true, would establish Defendants’ motive.

As a result, Plaintiff has not met the requirements for alleging fraud claims, and the Fourth and Seventh Counts must be dismissed.

E. Plaintiff Fails to State Causes of Action for Breach of Fiduciary Duty Against Beta Pharma or Zhang

As noted above, the Fifth and Eighth Counts of Plaintiff’s Complaint purport to state claims for breach of fiduciary duty against Beta Pharma and Zhang respectively. However, neither Count meets the requirements for stating such a claim under Connecticut law.

Under Connecticut law, “[i]t is axiomatic that a party cannot breach a fiduciary duty to another party unless a fiduciary relationship exists between them.” Biller Assocs. v. Peterken, 269 Conn. 716, 723 (2004). “Simply classifying a party as a

fiduciary inadequately characterizes the nature of the relationship.” Konover Dev. Corp. v. Zeller, 228 Conn. 206, 223 (1994). To show a fiduciary relationship, a plaintiff must show a “unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.” Biller Assocs., 269 Conn. at 723. Here, neither Count pleads a legally cognizable fiduciary relationship.

The Fifth Count recites two relationships between Beta Pharma and Plaintiff that allegedly give rise to a fiduciary relationship. Complaint, Fifth Count, ¶¶ 11-12. Neither meets the requirements for pleading a fiduciary relationship.

First, Plaintiff alleges that Beta Pharma “was a partner with plaintiff pursuant to the Agreement, and as such partner the defendant BP owed plaintiff a fiduciary duty.” Id. ¶ 11. However, the Complaint, including the copy of the Agreement that Plaintiff attached to it, fails to allege that Plaintiff and Beta Pharma formed the kind of formal partnership that would give rise to a breach of fiduciary duty.

A formal partnership creates a fiduciary duty between the partners and to the partnership. Spector v. Konover, 57 Conn. App. 121, 127 (2000). But this rule only applies to a formal partnership that creates a business entity. For example, in one recent case, the Superior Court rejected a plaintiff’s claim of breach of fiduciary duty where the “partnership” alleged was purely informal: “This claim presupposed plaintiff having proven the existence of a formal partnership in the eyes of the law that would have been accompanied by a fiduciary duty to the partnership. Since the plaintiff did not meet his burden of proving that a formal partnership had been created, he cannot

prevail on this count.” Langham v. Shook, 2014 WL 4494556, *4 (Conn. Super. Ct. Aug. 1, 2014).

The formation of formal partnerships in Connecticut is governed by the Uniform Partnership Act, Conn. Gen. Stat. § 34-300, et seq. Under that Act, a “partnership” is defined as “an association of two or more persons to carry on as co-owners a business for profit.” Conn. Gen. Stat. § 34-301(12). In other words, a statutorily defined “partnership” is a business entity. In Langham, the court found that no partnership had been proven in part because no business entity was created: “The court also finds that the parties were not ‘co-owners’ of any specific business, particularly when there was no name or other indicia of their agreement resulting in the creation of a separate entity.” Langham at *2.

Here, Plaintiff’s Complaint fails to show the existence of a formal partnership that created a new business entity. The Complaint itself establishes that the only basis for the formation of the “partnership” was the Agreement. Complaint, First Count, ¶ 10. The Complaint attaches a copy of that document. The document is called “Partnership Offering,” and the “partnership” that it offers is clearly not a formal partnership under the Uniform Partnership Act. It does not mention the creation of a new business entity, or the name of such an entity, or the registration of such an entity to do business. It does not contain provisions for the internal governance of an entity, or for a division of profits, or any provisions suggesting that Beta Pharma and Plaintiff were to be co-owners of an entity. As in Langham, there was no provision for a partnership bank account or partnership tax returns. See Langham at *2. Instead, the Agreement offers certain benefits to Plaintiff in return for bringing “potential to our organization.” Agreement at 1.

Thus, the Complaint itself, including the attached Agreement, contradicts the idea that any statutorily defined partnership or other business entity was created. The Agreement appears to use the term “partnership” informally to describe something more like an employment or independent contractor relationship than a formal partnership that might give rise to fiduciary duties. As the Supreme Court has held in the very similar context of determining the existence of an agency relationship, “the labels used by the parties in determining their relationship are not determinative; rather, a court must look to the operative terms of their agreement or understanding.” Wesley v. Schaller Subaru, Inc., 277 Conn. 526, 543-44 (2006). Plaintiff also has not alleged facts to show that Beta Pharma (or Zhang) was a partner with him in BPC. Indeed, Plaintiff specifically alleged that BPC is a closely held corporation, not a partnership. Complaint, Eighth Count, ¶ 14(b).

Also, Plaintiff alleges that Beta Pharma “was a seller of unregistered securities to plaintiff.” Complaint, Fifth Count, ¶ 12. However, Plaintiff does not cite or establish any basis for finding a fiduciary relationship under Connecticut law on the basis of the sale of securities. Indeed, a party does not owe a fiduciary duty to another party on the opposite side of a transaction. See, e.g., Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 40-41 (2000) (concluding “that, as a matter of law, the defendants did not owe the plaintiff the duty of a fiduciary . . . Here, the parties . . . engaged in an arm’s-length transaction . . .”). Plaintiff’s allegation of a sale fails to plead a fiduciary relationship.

Because Plaintiff does not allege a cognizable fiduciary relationship, he does not state a cause of action for breach of fiduciary duty against Beta Pharma.

Likewise, Plaintiff fails to state a cause of action for breach of fiduciary duty against Zhang. The Eighth Count recites four relationships between Zhang and Plaintiff that allegedly gave rise to a fiduciary relationship. Complaint, Eighth Count ¶ 14.⁷ But Plaintiff fails to meet the requirements for pleading a breach of fiduciary duty under any of these purported relationships.

First, Plaintiff alleges that Zhang was “a partner with plaintiff pursuant to the Partnership Agreement.” Id., ¶ 14(a). However, that claim is contradicted by the copy of the Agreement that Plaintiff attached to the Complaint, as the Agreement states: “Beta Pharma Inc. is very pleased to offer a partnership to you. We are very excited about the potential that you will bring to our organization!” Agreement at 1. Zhang signed the Agreement as “Representative of Beta Pharma, Inc.” Id. at 3. By its terms, the Agreement did not create a partnership between Plaintiff and Zhang.

Second, Plaintiff alleges that Zhang is “a fellow officer, director and stockholder with plaintiff [in] the closely held Canadian corporation BPC.” Complaint, Eighth Count, ¶ 14(b). The allegation that Zhang was a fellow stockholder in BPC cannot be the basis for a claim of breach of fiduciary duty, because the Complaint specifically pleads that Zhang was a minority shareholder, while Plaintiff was the majority shareholder. Id., Second Count, ¶ 14 (BPC was owned 51% by Plaintiff and 49% by Zhang). A claim based on shareholder status exists only against a majority shareholder. Yanow v. Teal Indus., Inc., 178 Conn. 262, 283 (1979). Further, a claim based on shareholder status can only be based on an allegation of corporate acts that injure the value of the corporation, Cox v. Reyes-D’Arcy, 2014 WL 4413788, *2 (Conn. Super. Ct. Aug. 13,

⁷ Among the three paragraphs that are numbered 14 in the Eighth Count, the allegations about Zhang’s relationships to Plaintiff, cited here and below, are in the first one.

2014), which is not alleged here. The allegation that Zhang was an officer or director of BPC also does not suffice without an allegation that Zhang had control over BPC. Yanow, 178 Conn. at 283 (fiduciary relationship is linked to control of corporation).

In any event, the Eighth Count does not allege a single action that Zhang took as a director, officer, or shareholder of BPC. It alleges rather that he breached his fiduciary duty to Plaintiff by failing to pay his salary, failing to issue him Beta Pharma stock, failing to register his ZJBP stock, and other actions related to Beta Pharma and ZJBP. Complaint, Eighth Count, ¶ 14.⁸ These are all actions that Plaintiff alleges that Zhang engaged in as an officer of Beta Pharma. Id., First Count, ¶ 12; Second Count, ¶ 15. Plaintiff specifically alleges that both Beta Pharma and Zhang took these same actions in breach of Plaintiff's Agreement with Beta Pharma. Id. There is no allegation that Zhang did these things in the course of exercising corporate control over BPC.

Third, Plaintiff alleges that Zhang had a fiduciary duty to him as an officer or director of ZJBP because Zhang had transferred one percent of the total shares in ZJBP to him. Id., Eighth Count ¶ 14(c). However, Plaintiff does not, in the Eighth Count, allege the conduct that would support a claim of an officer's breach of fiduciary duty to a shareholder, or that would establish that the Court should impose any liability on an officer, rather than on the corporation. Under Connecticut law, "the remedy of piercing the corporate veil to impose individual liability is restricted to extraordinary circumstances, when there is sufficient basis for a claim of breach of fiduciary duty based on fraudulent acts of individuals who occupy a fiduciary relationship Therefore, in order to support a claim of breach of fiduciary duty against an individual

⁸ This refers to the second paragraph in the Eighth Count that is numbered 14.

officer or majority shareholder, a plaintiff must allege fraudulent conduct to satisfy the elements of common law fraud.” Dattco Inc. v. Braband, 856 F.Supp.2d 354, 384-85 (D. Conn. 2012) (internal citation and punctuation omitted) (ruling under Connecticut law); Hart v. Mill Plain Autobody, 1999 WL 1212229, *2 (Conn. Super. Ct. Dec. 3, 1999). The alleged acts by Zhang that are the basis for the Eighth Count are not frauds, but rather a variety of other acts that Zhang allegedly took on behalf of Beta Pharma, such as failing to pay Plaintiff’s salary and failing to issue Beta Pharma stock to him.

Fourth, Plaintiff alleges that Zhang had a fiduciary duty to him as “seller of unregistered securities to the plaintiff.” Complaint, Eighth Count ¶ 14(d). As noted above, however, this allegation fails to plead a fiduciary relationship under Connecticut law.

Plaintiff also fails to allege any of the elements of a principal-agent relationship that would establish that either Beta Pharma or Zhang was his agent. The elements of such a relationship are: “(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking.” LeBlanc v. New England Raceway, LLC, 116 Conn. App. 267, 274-75 (2009). The Fifth and Eighth Counts do not allege any facts to support any of those elements. For example, at no point does Plaintiff allege that he made any manifestation that Defendants would act for him as his agent, such as an instruction to Defendants to act on his behalf.

Plaintiff’s failure to state a cause of action for breach of fiduciary duty against either Beta Pharma or Zhang mandates dismissal of the Fifth and Eighth Counts.

III. CONCLUSION

For the foregoing reasons, Beta Pharma and Zhang respectfully request that the Court dismiss the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counts of Plaintiff's Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by email this 5th day of November, 2015.

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